STATE OF NORTH DAKOTA

SEED ARBITRATION BOARD

IN THE MATTER OF:	)	
	)	**PROPOSED ARBITRATION DECISION**
	)	
Broten, et al. v. Agway Seed, Inc.	)	
	)	

. . . . . .

On May 25, 2000, the North Dakota Seed Arbitration Board ("Board") received a request for arbitration letter from Ms. Sarah Vogel, attorney, and Mr. Damian Huettl, attorney, on behalf of 19 named Petitioners, submitting for arbitration a defective seed dispute with the Respondent, Agway, Inc. ("Agway" or "Respondent") to the Board. On June 12, 2000, Ms. Vogel and Mr. Huettl updated the list of Petitioners by adding one name. There are now 20 named Petitioners. This is the fourth group (group D - the Broten group) submitting a grievance to the Board for arbitration in regard to the same defective seed dispute with Agway. The first two groups had hearings on December 21, 1999. On April 11, 2000, Mr. Paul C. Germolus issued his Proposed Arbitration Decision with regard to those two groups (Group A - Jorgenson group and Group B - Loraas group). The third group had a February 18, 2000, hearing. On April 3, 2000, ALJ Allen C. Hoberg issued his Proposed Arbitration Decision with regard to the third group (Group C - Nitschke group). On April 25, 2000, the Board issued its Nonbinding Recommendation with regard to groups A-C, a combined recommendation.

On June 2, 2000, the Board requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings in this matter, the Broten group, to conduct an arbitration hearing and to issue a proposed arbitration decision for the Board to consider in

issuing its non-binding recommendation for resolution of a dispute under N.D.C.C. § 4-09-20.2. On June 13, 2000, the undersigned ALJ was designated.

On June 27, 2000, the Board issued a Notice of Hearing. The hearing was held as scheduled on July 21, 2000, in the Fort Union Room, State Capitol, Bismarck, North Dakota. Few of the petitioners were present. However, the Petitioners were represented at the hearing by Ms. Vogel and Mr. Huettl. The Respondent was present at the hearing through various officers and employees. Mr. Duane Breitling, Fargo, represented the Respondent at the hearing. The Petitioners submitted a written statement (facts and argument) (exhibit A) and fact specific documentation in a large gray-covered binder from each of the 20 farmers or growers who are Petitioners in this matter (exhibit B). The Respondent submitted a written statement (facts and argument) with 13 attachments (exhibit 1). All of the exhibits submitted were considered by the ALJ. There was some witness testimony from Agway representatives, questions were asked by the parties, and the Board asked some questions.

Board members present at the hearing included members Ashley, Gustafson, Schlosser, Tweed, and Knudson (actually Dave Nelson sat in for Knudson as the representative of the Commissioner of Agriculture, however, Knudson will participate in the decision making in regard to the Broten group, as he did with the other three groups).

Because the Board had already issued a decision on the other three groups, and because the Petitioners' claim that the losses suffered and their cause are substantially similar, the Petitioners' asked for a decision without hearing. The Board declined this request but did honor the Petitioners request for a somewhat abbreviated hearing.

Both parties asked the Board to take official notice of the record from the proceedings concerning Groups A-C held on December 21, 1999, and February 18, 2000. The ALJ takes official notice of those records and recommends that the Board do so, too.

The parties requested the opportunity to file written closing briefs. The request was granted. The Petitioners filed their brief on July 31, 2000. The Respondent filed its brief on August 8, 2000. The Petitioner's filed their Rebuttal Brief on August 14, 2000. Therefore, the hearing on this matter is considered closed as of August 14, 2000.

The Board met on July 31, 2000, to discuss the July 21 hearing. Apparently, the Board decided that it may reconvene the Broten group hearing. See Petitioner's Rebuttal Brief at 1.

Petitioners in this matter, as in the other three matters, allege that an Agway confection sunflower seed, Royal Hybrid 2073 ("2073") (actually several seed lots of 2073, particularly those seed lots consisting of large and extra large seed), did not properly germinate. They further allege that 2073 had poor emergence, poor vigor, thin stands, and an unusual number of deformities. As a result, the Petitioners, who are all sunflower growers involved in the dispute, allege that they experienced significantly lower yields on their 2073 fields than on comparable nearby fields planted with other seed varieties using similar farming practices. The Petitioners further allege that Agway is responsible for the seed and liable to the Petitioners in the amount of $805,067.82 for total damages resulting from the defective 2073 seed. See exhibit A, 1. Because the parties were unable to resolve any of the issues of this dispute prior to or at the hearing, the issues for decision, then, are whether the evidence shows, by the greater weight of the evidence, that Agway's 2073 is defective seed, and whether Agway is responsible for defective seed and liable to the Petitioners in the amount alleged.

There is currently pending civil action against Agway in the courts, and some of the farmers involved in the civil action are not residents of North Dakota, but, rather, residents of Minnesota and South Dakota. These nonresidents believe that it may be necessary to also be a part of an arbitration hearing in North Dakota, along with North Dakota residents who are making the same claims in the civil action. Therefore, they joined this administrative action because they fear exclusion from a civil lawsuit if they have not first brought an arbitration matter before the Board as required in N.D.C.C. § 9-09-20.2 and N.D. Admin. Code title 100. However, all of the petitioners, whether residents of North Dakota or not, bought 2073 either directly from Agway or indirectly from Agway through distributors or private labelers for planting in the spring of 1999. This decision applies to all of the 20 petitioners filing with the Board.

Based on the evidence presented at the July 21 hearing and the matters officially noticed (the record from the proceedings on groups A-C), the administrative law judge makes the following abbreviated findings. The ALJ went into considerable detail in his April 3, 2000, decision, as did Mr. Germolus in his April 11, 2000. It is not necessary to repeat much of what the ALJ said in that decision. The decision in regard to the Broten group is essentially the same as the decision for the Nitschke group. Considering the evidence overall, the ALJ is compelled to make the same decision.

However, there is no doubt that this time Agway showed that overall loss of production (yield/acre) for all farmers was considerably lower in almost all the counties involved in this matter. However, this almost uniform lower production does not explain the devastating loss of production shown by some of the Petitioners, likely due, at least in part, to poor germination. Not all of the Petitioners show devastating loss, and the situations of some of those that don't

can, perhaps, be explained by a uniform loss attributable to a bad year, but some Petitioners do show a devastating loss. Also, this time Agway showed that some of the comparable field yields of some of the Petitioners may be exaggerated somewhat, but that showing, even if accurate, still does not explain the whole situation, perhaps just a part of it. Finally, more doubt has been cast on the testing methodology and procedures of all the involved testing entities, largely because of the wide differences in testing results and because of further explanations and argument made at the July 21 hearing and in post-hearing briefs. Perhaps the differences in results can be explained by differences in germination testing methodology and testing procedures, perhaps not. The ALJ and the Board has not the benefit of expert testimony in this area. There was no opportunity for the ALJ or the Board to ask questions of a person knowledgeable in seed testing. However, it should be emphasized that this is an arbitration hearing, the result of which is a nonbinding recommendation by the Board. It would be a considerable expense to the parties to obtain all of the necessary witnesses to fully flesh out this dispute, an expense that they are apparently willing to undertake in civil litigation, but that no one should necessarily have to undertake in an arbitration proceeding. Litigation is not the procedure or the purpose of the arbitration hearing. The courts are left with that process in seed disputes, and, apparently, a civil action will ultimately be determinative in these four arbitration matters, if the parties do not settle. Certainly the appropriate experts will be called as witnesses in the civil proceedings,.

While there are some further doubts and concerns raised by the additional evidence and argument presented with the Broten group, overall the result is the same. The Petitioners have met their burden of proof and are entitled to a nonbinding recommendation in their favor.

FINDINGS OF FACT

1. The 20 Petitioners are all farmers or grower groups in North Dakota, Minnesota, and South Dakota that farm and grow confection sunflowers at various locations. Each of the Petitioners purchased 2073 either directly from Agway or indirectly from Agway through distributors or private labelers for planting in the spring of 1999. Four growers contracted directly with Agway. Four growers contracted with Agway through a third party. The remaining 12 growers purchased 2073 directly through a third party.

2. Again, although the evidence about the farming practices of each Petitioner is not certain, the evidence appears to show that each of the Petitioners grew 2073 using rather similar, normal farming practices, just as they used similar, normal farming practices to grow other confection sunflower seed in the 1999 and other crop seasons.

3. Other growers besides the 20 in Group D experienced a similar situation with regard to 2073. See Groups A-C materials. There are approximately 63 growers in Group C from around the state of North Dakota. There are approximately 11 growers in Group A from around the Leeds, North Dakota area. There are approximately 15 growers in Group B, from around the Langdon, North Dakota area. See *id.* These four groups represent a wide variety of farmers from various locations in North Dakota, encompassing land mostly in east and east-central North Dakota from the Canadian border to South Dakota. The Minnesota growers are from three northwest Minnesota counties. The South Dakota growers are from one South Dakota county.

4. The ALJ adopts his Findings of Fact (nos. 4 and 5, and 7 through 10) from his April 3, 2000, Proposed Arbitration Decision.

5. The seed in question in this matter was not old seed but it was stored for a period of time. Part of the 2073 seed sold and planted for the crop year 1999 was grown in the southern hemisphere. That seed was planted in November 1997, harvested in approximately March of 1998, cleaned, and then transported to this country for sale in the normal course of business. Other 2073 seed sold and planted for the crop year 1999 was grown in the California Sacramento River valley. This seed was planted in 1998, harvested in 1998, cleaned in 1998, and then stored. Both the southern hemisphere grown seed that was transported to the U.S. and the California seed was stored for approximately the same length of time from sometime in 1998 until its sale in 1999.

6. Agway admits to inconsistent germination test results from testing before it began selling 2073 in 1999, but it felt comfortable in median results and tagged all 2073 at an 85 percent germination rate. Agway had "numerous customers anxiously awaiting shipment" of sunflower seed. Record from Nitschke group, Agway Supplementation and Response, at 2 (March 26, 1999, letter).

7. In 1999, each of the 20 Petitioners, each a 2073 grower, experienced lower yields from 2073 when compared to other comparable sunflower fields planted to different varieties in nearby fields by these growers or other growers. Some of the 20 Petitioners experienced virtually no, or drastically lower, yields from 2073 as compared to other comparable sunflower fields. As a group, the Petitioners experienced 2073 sunflower seeds that had poor emergence, poor vigor, thin stands, and an unusual number of deformities. Some or all of these growing problems affected each of the Petitioners.

8. Each of the 20 Petitioners has specifically, sufficiently demonstrated, to the best their ability, a loss from the resulting lower 2073 yields. Exhibit A, 1; see gray binder for specific grower information.

9. Nine growers experienced a loss in yield (lbs./acre) of above 1000 lbs./acre from planting 2073 as compared to other comparable yield experience for other varieties. Exhibit A, 1. The remainder of the 20 growers experienced a yield loss of from 312 lbs./acre to about 880 lbs./acre; many in the 500-1000 lbs./acre yield loss range. Id. There is evidence that even with significantly lower stand counts (PPA) (number of sunflower plants per acre) sunflower yields can still be adequate. However, the Petitioners experienced considerable loss in yield individually, and as a group, from stand counts that were not adequate, individually, and as a group.

10. Agronomists and other crop consultants, as well as Agway specialist, inspected some of the 2073 fields from the various groups (A-D).

11. The ALJ adopts Findings of Fact nos.16 -19 from his April 3, 2000, Proposed Arbitration Decision.

12. Stand counts are at least some evidence of germination success, as well as a measure of emergence. Obviously, if a seed doesn't germinate, it does not emerge. Agway now seems to back away from its previous heavy reliance on stand counts. The ALJ adopts his previous statements in Finding of Fact no. 20 about the suspect nature of Agway's stand counts.

13. The ALJ adopts Finding of Fact no. 21 from his April 3, 2000, Proposed Arbitration Decision.

14. The results for 2073 in 1999 were quite uniform, as to all the growers in Groups A-D, including the Broten group. The results were uniformly poor yields for 2073 regardless of

the varying types of conditions in land areas and varying environmental conditions throughout the state in 1999. Agway 2073 large and extra large seed seemed to have the most problem, but the problem was also, to a lesser extent, with Agway 2073 medium seed.

15. The ALJ adopts Findings of Fact nos. 23-26.

CONCLUSIONS OF LAW

The ALJ adopts his Conclusions of Law, in total from his April 3, 2000, Proposed Arbitration Decision.

RECOMMENDATION

Just as at the first two hearings, there was no resolution of any of the issues at this fourth arbitration hearing. Just as at the first two hearings, the Petitioners must prove that 2073 is defective seed, that Agway is responsible for the 2073 defective seed, and that Agway is liable to pay the Petitioners consequential damages resulting from the defective seed. Notwithstanding additional evidence and argument made for the first time in this hearing, Petitioners have still met their burden of proof. Overall, the evidence still shows defective seed and Agway responsibility and liability. Perhaps the losses are not actually as great as some of the Petitioners claim; perhaps there was an amount of overall loss to confection sunflowers in North Dakota and elsewhere in 1999 due to environmental problems and the Petitioners should share in that overall loss; perhaps there are differences in testing methodology and procedures between the entities that tested 2073 in 1999 and 2000. Yet, the overall weight of the evidence demonstrates that the Petitioners have met their burden. Absent expert testimony that might convince the ALJ otherwise, he has seen nothing in the way of evidence or argument in this third hearing that would make him change his mind.

Accordingly, based on the proposed findings of fact and conclusions of law, the ALJ proposes that the Board RECOMMEND that the Respondent pay the Petitioners the total amount of the loss that they claim (individually, the amount of loss that each Petitioner claims) but not the interest on the loss nor the RMA-USDA calculable loss. The ALJ recommends that Agway pay a total of $730,689.24 in damages to the 20 Petitioners.

Dated at Bismarck, North Dakota, this 17th day of August 2000.

State of North Dakota
Seed Arbitration Board

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